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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1299

THE STANDARD OIL COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit
and
SUPPORTING BRIEF.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Standard Oil Company, respectfully alleges.

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

A. Preliminary Statement.

This is a Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit, which reversed a judgment rendered by the District Court of the United States for the Northern District of Ohio (Freed, *J.*), in favor of petitioner, The Standard Oil Company, an Ohio corporation, for excise taxes in the amount of $158,120.51 plus interest from varying dates in the year 1937, which said company had paid in connection with sales of gasoline and oil made by two of its subsidiaries.

The opinion of Judge Freed, which is most carefully reasoned and unusually complete, appears on pages 276 to 298 of the record and is reported in 63 F. Supp. 48. The decision of the Court of Appeals which appears on page 318 of the record is reported in 158 F. 2d 126. Both the decision of the Circuit Court reversing the District Court, and the denial by the Circuit Court (R. 343) of petitioner's application for rehearing were by a 2-to-1 vote, Circuit Judge Miller dissenting *in both instances.*

The taxes here involved were levied under Section 601(c)(1) and Section 617(a) of the Revenue Act of 1932, which imposed a tax of 4¢ per gallon on lubricating oil and 1¢ per gallon on gasoline, sold after the effective date of the tax *by a producer,* and under Section 617(a), as amended by Section 211(a) of the National Industrial Recovery Act of 1933, which imposed an additional tax of ½¢ a gallon on gasoline sold after the effective date of said amendment *by a producer.* Two assessments were made. One, for $118,825.09 was made jointly against The Standard Oil Company and its wholly owned subsidiary, Fleet-Wing Corporation; and the other for $39,293.42 was made jointly against The Standard Oil Company and its subsidiary, Caldwell and Taylor Corporation, all of whose stock Standard owned except $147,000.00 of preferred stock.* **

The assessments arose out of the following transactions: Standard, after the enactment of the applicable tax laws but before these laws went into effect, sold to its said subsidiaries large quantities of gasoline and oil which the subsidiaries *resold* after the effective date of said tax laws. The assessments were levied not on the sales made by Standard, a producer, to its subsidiaries before the applicable tax laws were in effect, but on the *resales* by the sub-

* The Standard Oil Company will be referred to herein as Standard, Fleet-Wing Corporation as Fleet-Wing, and Caldwell and Taylor Corporation as Caldwell.

** Emphasis herein supplied unless otherwise indicated.

sidiaries (who were not producers but only dealers, Stipulation 50, R. 59) *after* the tax laws were in effect.

Standard alone paid the assessments, and thereupon timely filed its refund claim with the Commissioner. The Commissioner rejected the refund claim whereupon Standard timely filed this suit in the District Court to recover the taxes paid.

B. Proceedings in the District Court.

To the allowance of Standard's suit, the Government interposed three defenses, all of which the District Court rejected. These were:

1. that the subsidiaries were Standard's instrumentalities and agencies and that the resales by them were the sales of Standard, a producer, made after the effective date of the tax laws;
2. that Standard had failed to comply with the requirements of Section 621(d) of the Revenue Act of 1932;*
3. that any recovery by Standard would constitute an unjust enrichment of Standard and violate good conscience and equity.

With respect to the Government's first defense the District Court made detailed findings of fact (R. 298-307) among which are the following:

(1) that Fleet-Wing was a wholly owned subsidiary of Standard but that A. B. Caldwell, President of Caldwell, owned $147,000.00 face amount of Caldwell's Series "A" preferred shares having no voting rights (F. 6, R. 300).

(2) that Fleet-Wing and Caldwell were at the time of the enactment of the 1932 Revenue Act and had for several years theretofore been engaged in the marketing of gasoline and oil on a large scale in active competition with Standard under their own names and to their own separate customers (R. 300-301).

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* This section appears in Appendix, page 25.

(3) that at the time of the questioned transactions both subsidiaries were wholly autonomous; were not being operated as branches, agencies or instrumentalities of Standard, and their activities were being conducted without any domination, interference or intervention by Standard or any of its officers.

(4) that the questioned transactions were made through proper contractual relations, at reasonable prices and upon terms and conditions not unusual in the case of transactions between manufacturers and distributors in the oil industry, were in all respects arm's-length transactions to be given full effect (R. 308), and were valid bona fide sales fully consummated before the excise tax laws became effective; that the leasing at nominal amounts of storage tanks to the subsidiaries by Standard in connection with the sales to them here involved was a usual practice in the trade necessary to maintain good will, whenever producers made large sales to jobbers or purchasers who had no adequate storage facilities of their own.

(5) that the sales were made for a legitimate business purpose and not for the sole and independent purpose of avoiding the payment of taxes (R. 296); that at the time of the purchases by the subsidiaries, nearly all their non-producer competitors were purchasing large quantities of gasoline and oil from either independent or affiliated suppliers in anticipation of an increase in the cost of these products after the effective date of the newly enacted tax laws; and that the subsidiaries made the purchases to put them on a competitive parity with other jobbers, because, if the subsidiaries did not make the purchases before the tax laws went into effect, they would have to sell gasoline bought by them after such date "tax-on," in competition with other jobbers nearly all of whom had stocked up heavily with gasoline and oil bought "tax-free" before such effective date (Findings 16 and 21, R. 303 and 305).

(6) that Standard established that it did not include the tax herein sought to be recovered in the prices at which the gasoline and lubricating oils were sold to the two subsidiaries.

(7) "that the Treasury Department contemplated such transactions as these might not come within the provisions of the law as later enacted was (is) apparent from the fact that it suggested the immediate enactment of an excise tax applicable to the sale of gasoline and oils by all non-producers possessing on the effective date of the law quantities either of gasoline or oil, in excess of certain stated amounts. The letter addressed by the Treasury Department to Congress said:

> " 'It appears that during the fifteen days between the enactment of the law and its effective date a very large portion of gasoline stocks in the hands of producers will be transferred to selling and distributing companies to avoid the tax. Some of the largest producing companies have affiliated sales companies and can do this through their affiliates in the usual course of business * * * the Treasury may lose the tax on as much as 40,000,000 barrels. This would amount to a loss of approximately $17,000,000.'
>
> "Congress which was urged and had the power to extend the tax to embrace transactions of this character, refused and failed to do so." (Opinion R. 296)

Having made the above findings, the District Court analyzed among others (R. 289-295) the cases of *Gregory v. Helvering,* 293 U. S. 465; *Jones v. Helvering,* 71 F. 2d 214, Certiorari denied; *Page v. Haverty,* 129 F. 2d 512; *Higgins v. Smith,* 308 U. S. 473; *National Investors Corp. v. Hoey,* 144 F. 2d 466; *Commissioner v. Court Holding Co.,* 324 U. S. 331; *Mehrlust v. Higgins,* 112 F. 2d 717; *E. Albrecht & Son v. Lande,* 114 F. 2d 202, and *Continental Oil Company v. Jones,* 113 F. 2d 557. Thereupon it concluded:

"It is well established that the mere fact that a transaction occurs between a parent corporation and a wholly owned subsidiary which is of benefit tax-wise to the parent does not, *ipso facto*, give rise to suspicion that it was tainted by an intent to commit injustice or a fraud upon the revenue of the United States. Before a court may strip the subsidiary of its corporate cloak, there must be evidence of form rather than of substance, of fiction, sham, unreality, subterfuge or something akin thereto, or the transaction must take place for the *sole* purpose of avoiding taxes to justify a conclusion that the subsidiary is a mere agency or instrumentality of the parent company." (R. 287.) (Emphasis by the court.)

Accordingly, the District Court rejected this first defense.

The Government's second defense was as above stated that Standard had failed to comply with the requirements of Section 621(d) of the Revenue Act of 1932. The District Court rejected this defense because it stated that Standard had complied with this section. The Court pointed out that said section merely provided that

"No overpayment of tax under this title shall be credited or refunded * * * unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that *he* has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee,"

and that Standard, which was admittedly the sole taxpayer, had established in its refund claim and in fact that *it* had not passed on the tax to its subsidiaries.*

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* The Government conceded in open court that Standard had not collected any part of the tax from the subsidiaries on the sales to them (R. 187-188), and it was stipulated that Standard's prices to the subsidiaries on these sales were as low as those which had prevailed for some time before the applicable tax laws were enacted (Stipulations 17 and 35, R. 43 and 51).

The District Court deemed it unnecessary in order that Section 621(d) and Article 84 of Regulations 44 be complied with that Standard also establish that its subsidiaries had not passed on the tax in connection with their resales to their ultimate purchasers. The reason was that Standard had established that these resales were not made by it but by the independent subsidiaries which were admittedly not producers but only dealers, and because Standard had no greater obligation to establish the non-passing on of the tax by these subsidiaries than it had in the case of resales made by jobbers wholly independent of and unaffiliated with Standard who had purchased gasoline from it before the effective date of the applicable tax laws, which they had resold after such effective date.

With respect to the third defense of the Government, namely, that any recovery would constitute unjust enrichment of Standard and would violate good conscience and equity, the District Court stated: "That is another way of stating that such transactions must be held to be a fraud upon the revenue if they produce a profit to the subsidiary which eventually redounds to the benefit of the parent. Viewing all the facts and circumstances surrounding the transactions here in question from their inception through their conclusion, under the Government's theory of the facts of this case it would be difficult, if not impossible, to conceive of a set of circumstances under which a parent could engage in any business transaction with a subsidiary corporation so as to result in a tax advantage and not be subjected to the charge that the subsidiary was the agent or the instrument of the parent. * * * The Court is of the definite conclusion that there was no fraud either constructive or real upon the revenue" (R. 297 and 298).

C. The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals did not question the correctness of any of the findings of fact made by the District Court as set forth on pages 3 to 5 above, nor did it even mention any of the decisions of the Supreme and Circuit Courts analyzed by the District Court discussing when separate corporate entities may be disregarded. It reversed the District Court because of "the error of the District Court in denying the motion of the United States to dismiss the action for the reason that Standard's claim for refund failed to comply with the requirements of Section 621(d) of the Revenue Act of 1932" (R. 318), which failure the Court of Appeals called "the decisive issue." This failure the Circuit Court's opinion stated consisted of the fact that

> "There was no claim or showing made that the *subsidiary corporations*, jointly assessed with Standard, had not included the tax in the price of the oil and gasoline when sold to the *ultimate purchasers* **from them.** No claim or proof that the tax burden had not been shifted to the *ultimate purchaser* of the commodities is inferable from the claim, or from the record in the case. The trial judge excluded evidence proffered by the Government with respect to the price at which the subsidiary companies had sold the gasoline and oil transferred to them by Standard. In his view, the evidence was immaterial."

This language of the Court shows clearly that it interpreted Section 621(d), which merely requires that the taxpayer establish that "*he* has not included the tax in the price * * * or collected the amount of the tax from the vendee," as also requiring in the instant case that the taxpayer establish as a condition of recovery that his *subsidiaries* did not pass on the tax to *their customers.* In making this interpretation the Circuit Court did not purport to disregard the separate corporate entities of Standard and its subsidiaries and to treat them as one, because it specifically stated on page 1 of its Opinion (R. 320) that it did not

deem it necessary to its decision to determine "that the subsequent sales of such products by the subsidiaries were as subject to the excise taxes as if the sales had been made by The Standard Oil Company."

Despite this statement, however, the Court in fact by its interpretation did disregard the separate corporate entities of Standard and its subsidiaries, Fleet-Wing and Caldwell and Taylor, and did treat the subsidiaries as being Standard, the taxpayer. In no other way than by so doing and by treating the ultimate purchasers of the subsidiaries as being Standard's purchasers could the Court possibly have concluded that the Statute, which in terms merely required the taxpayer to establish that "*he*" did not pass on the tax to his vendee, also required him to establish that the subsidiaries did not pass on the tax to their ultimate purchasers.

The Circuit Court *really* held that the combined facts (a) that a parent owned all the voting stock of subsidiaries and (b) that a tax benefit might accrue to the parent or the subsidiaries from transactions between them, *ipso facto* and *without more* required that the separate corporate entities of the parent and its subsidiaries be disregarded—this, regardless of the fact that the subsidiaries had been in business in active competition with the parent for years before the transactions between them took place; that they were not the instrumentalities, agencies or alter ego of the parent, but had at all times been entirely free from domination by it; that the transactions between them were real and not sham, were not tainted by fraud or sinister purpose, but were bona fide, arm's length transactions entered into for sound, competitive business reasons and not solely to avoid taxes; and were identical in scope and character with transactions deemed wholly unobjectionable by the Government, which were generally being entered into at the same time by practically all competitors of the subsidiaries with the unaffiliated suppliers of these competitors.

That the above is neither an exaggeration or over-simplification of the Circuit Court's holding appears beyond question from the following quotation from its opinion:

> "At the time of the sales upon which the excise taxes had been assessed, Standard owned all the stock of one subsidiary and all the voting stock of the other. *Even if the transactions between Standard and its subsidiaries immediately before the excise taxes became operative be deemed to have been bona fide, arm's length transactions between independent corporations, and the sales to have been for legitimate business purposes and not for the evasion of taxes,* as held by the district court, it would seem that where Standard was jointly assessed with its subsidiaries in the first instance for payment of the excise taxes, the burden rested upon it, pursuant to the statute and the regulations, to state in its refund claim and to establish before the Commissioner that neither it *nor its subsidiaries* had included the tax in the price of the oil and gasoline subsequently sold by the subsidiary companies to ultimate purchasers."

To be sure, in the above quotation, the Court based its conclusion, which in effect constituted a disregard of the separate corporate entities of Standard and its subsidiaries, not merely on the presence of the two factors heretofore mentioned, namely (a) ownership by the parent of all the subsidiaries' voting stock and (b) the possibility that a tax benefit might accrue from the transaction between them, but also on the presence of a third factor, namely, that the subsidiaries were jointly assessed with the parent. The presence of this third factor, however, obviously did not constitute justification for the Court's disregard of the corporate entities if such disregard was not already justified by the other two factors. The reason is that the tax here involved was under the applicable statutes assessable only against *producers* and not against *dealers*, whereas the refund claim alleged and it was at all times

conceded by the Government that the subsidiaries were not producers but only dealers. Accordingly, the action of the Commissioner in joining the non-producer subsidiaries in the assessment was a wholly arbitrary act without legal effect, which could not possibly avail to bolster up the Court's conclusion.

In the light of the above, under the Circuit Court's decision, disregard of the separate corporate entities of a parent and its subsidiary would be required *whenever* (a) the parent owned all the voting stock of the subsidiary and (b) a tax benefit might accrue to either from the transaction between them. Stock ownership and the possibility of a tax benefit would become the only issues. Once these have been proved, all evidence as to the history and method of doing business of the parent and its subsidiary; the independent, autonomous and uncontrolled nature of the operations of the latter; the validity, bona fide, arm's length character and sound business purpose of the transactions between them; the separateness and independence of their executives, directors, organizations, finances, accounts, personnel, offices, and like factors, which courts have heretofore almost universally deemed basic to their decisions in cases of this type, would become wholly irrelevant and inadmissible.

The Circuit Court's decision was erroneous in two other respects:

First, in requiring the disregard of the corporate entities of Standard and its independent subsidiaries not only in the case of Fleet-Wing, all of whose stock Standard owned, but also in the case of Caldwell, $147,000 of whose Series "A" non-voting preferred stock was owned by interests entirely independent of Standard without any rights or strings thereon in Standard. Seeing that this fact placed Standard in a fiduciary relation to Caldwell in its dealings with it, the Court should not have disregarded the

separate corporate entities of Standard and Caldwell regardless of whether it did so in the case of Fleet-Wing; *

Second, in requiring the disregard of the separate entities of Standard and its subsidiaries where the result of so doing was (as shown on page 5 hereof) to impose a tax on transactions which Congress had refused to tax although it had been urged to do so by the Treasury Department, that is, where so doing, virtually effected an amendment of the Revenue Act of 1932 which Congress had deliberately refused to make.

II. STATEMENT PARTICULARLY DISCLOSING BASIS OF JURISDICTION.

A. Statutory Provisions.

The statutory provision sustaining the jurisdiction of this Court herein is 28 U. S. C. A., Paragraph 347(a) providing "in any case, civil or criminal, in a Circuit Court of Appeals, * * * it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, * * * to require by certiorari, * * * that the cause be certified to the Supreme Court * * *." The instant suit is a civil suit arising under the laws of the United States for the recovery of internal revenue taxes totalling $158,120.51 plus interest alleged to have been illegally assessed and collected from petitioner under Section 601(c)(1) and Section 617 of the Revenue Act of 1932 and Section 617, as amended by the National Industrial Recovery Act.

B. Date of Judgment Sought to be Reviewed.

The date of the judgment of the Circuit Court of Appeals herein sought to be reviewed was February 3, 1947, on which date petitioner's application for rehearing was denied (R. 343).

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* This is the holding in *Samson Tire & Rubber Corp. v. Rogan, Collector*, 136 Fed. 2d 345, certiorari denied, 320 U. S. 770 (discussed on page 14 hereof).

III. THE QUESTIONS PRESENTED.

Question 1: Where a manufacturing parent corporation, which owns all the outstanding stock of a subsidiary *except a substantial amount of its non-voting preferred*, sells to such subsidiary *before* the effective date of a Federal excise tax law, goods which the subsidiary resells *after* such effective date, and the Government later assesses a tax against the parent on the *resales* made by the subsidiary, does Section 621(d) of the Revenue Act of 1932, which in terms requires only that the *taxpayer* establish "that *he* has not included the tax in the price of the articles with respect to which it was imposed, or collected the amount of tax from the vendee," preclude the parent-taxpayer from recovering the tax unless it establishes not only that *it* did not pass on the tax to its subsidiary, but also that the *subsidiary* did not pass on the tax *to its ultimate purchasers*—this, even though the subsidiary was not an instrumentality, agency or the alter ego of the parent but was completely autonomous and independent of it in its operations, and the sales were bona fide and at arm's length, made for sound, competitive business reasons and not solely to effect tax savings?

Question 2: Would the answer to Question 1 be the same if, instead of a substantial part of the stock of the subsidiary being owned by outsiders, the parent owned *all* the outstanding stock of the subsidiary?

Question 3: Has the law now arrived at the point where, if a parent corporation owns either all the voting stock or all the outstanding stock of a subsidiary, their separate corporate entities must, in a suit by the parent to recover excise taxes arising from transactions between them, be disregarded whenever recognition of the separate corporate entities would result in a tax benefit to either of them—this, however long the subsidiary may have been owned by the parent or been in active competition with it before the transaction in question took place, however in-

dependent and uncontrolled, and however bona fide, at arm's-length, real and free from sinister or fraudulent purpose all said transactions may have been, and even though the transactions may have been entered into not solely to gain a tax benefit, but for the sound business purpose of enabling the subsidiary to compete with others in the same business, who were admittedly able to effect the same tax saving by entering into identical transactions with unaffiliated corporations?

Question 4: Would the fact that the Treasury Department, between the enactment and the effective date of the Revenue Act of 1932, strongly urged Congress to amend the Act so as to subject the transactions referred to in Questions 1 to 3 inclusive to a tax under the Act but that Congress deliberately refused to do so, preclude a disregard of the separate corporate entities of the parent and subsidiary if thereby the transactions in question would be rendered taxable?

IV. THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. The Decision of the Circuit Court of Appeals, Insofar as it Relates to Transactions Between Standard and Caldwell, its Partially Owned Subsidiary, is in Conflict with the Decision on the Same Matter of the Circuit Court of Appeals for the Ninth Circuit Rendered in Samson Tire & Rubber Corporation vs. Rogan, Collector, 136 Fed. 2d 345 (Writ of Certiorari Denied, 320 U. S. 770).

As shown on page 3 hereof, Standard owned all the stock of Fleet-Wing. However, while it owned all the voting stock of Caldwell and \$733,000.00 par amount Series "B" non-voting preferred stock, interests absolutely independent of Standard owned outright \$147,000.00 face amount of Caldwell's Series "A" non-voting preferred stock which was superior to Series "B" preferred stock. This outside

ownership of a substantial part of Caldwell's preferred stock brings the Court of Appeals' decision as to *Caldwell* in direct conflict with the decision of the Circuit Court of Appeals of the Ninth Circuit in *Samson Tire & Rubber Corporation vs. Rogan, Collector,* 136 Fed. 2d 345 (Writ of Certiorari Denied 320 U. S. 770). There the Ninth Circuit Court on almost identical facts held that Section 621 (d) of the Revenue Act of 1932 did not require the manufacturing taxpayer to establish that its affiliated purchasing corporation had not passed on the tax when it resold the goods subjected to tax, and that the corporate entities of the two should not have been disregarded.

The *Samson-Rogan* case was a suit by Samson Tire & Rubber Corporation, a *manufacturer* of tires, to recover a *manufacturer's* excise tax assessed against and paid by it under the Revenue Act of 1932 on a stock of tires and tubes sold by it *before* the effective date of the Revenue Act of 1932 to United States Rubber *Products,* Inc., a *non*-manufacturing distributor, and resold by the latter *after* such effective date to its customers. The tax was assessed not on the sales to United States Rubber Products, Inc. by Samson Tire & Rubber Corporation, but on the resales by the latter to *its* customers. The Commissioner's theory in making the assessment was that Samson Tire & Rubber Corporation and United States Rubber Products, Inc. were part of one "system" of rubber corporations and that both were controlled by the top company, namely, by United States Rubber *Corporation*; and that, therefore, the resales by United States Rubber *Products,* Inc., the distributor, were to be deemed the sales of Samson Tire & Rubber Corporation, the manufacturer.

The so-called rubber "system" consisted of five companies as follows:

United States Rubber Corporation hereafter referred to as "Rubber";

Meyer Rubber Company hereafter referred to as "Meyer";

Samson Corporation hereafter referred to as "Samson";

Samson Tire & Rubber Corporation hereafter referred to as "Tire"; and

United States Rubber Products, Inc. hereafter referred to as "Products."

Rubber directly owned all Meyer's stock and all Products' stock.

Meyer owned all Samson's voting common stock and hence controlled Samson, but unaffiliated outsiders owned 45,155 non-voting common shares and 141,785 preferred shares of Samson.

Samson and Meyer between them owned 160,495 common shares and 79,929 convertible preferred shares of Tire and hence controlled Tire, but unaffiliated outsiders owned 4,515 common shares, 71 convertible preferred shares and 5,769 non-convertible preferred shares of Tire.

In denying that it was proper to disregard the separate corporate entities of the manufacturing taxpayer and its affiliated purchaser corporation, the Ninth Circuit Court stated:

> "As Meyer's sole stockholder, Rubber controlled Meyer. Meyer owned a majority of Samson's voting stock and thereby controlled Samson. Samson owned a majority of appellant's voting stock and thereby controlled appellant. Thus, indirectly, Rubber controlled appellant. In exercising such control, *Rubber was a fiduciary. Southern Pacific Co. v. Bogert,* 250 U. S. 483, 492, 39 S. Ct. 533, 63 L. Ed. 1099; *Pepper v. Litton,* 308 U. S. 295, 306, 60 S. Ct. 238, 84 L. Ed. 281. *Its powers were powers in trust. Pepper v. Litton, supra.* It could not lawfully, and presumably did not, exercise its powers in its own interest merely. It was bound to, and presumably did, exercise them in the interest and for the benefit of appellant, which in-

cluded the benefit to the common shares other than Rubber's and the 141,785 shares of appellant's preferred stock owned by others than Rubber, whose shares had a preference right in the profits of such business, and in any accretion of capital making more certain a full return of capital on partial or final liquidation. There is no evidence that Rubber abused its power or violated its duty with respect to appellant or its stockholder interests. *Here was at once a legitimate business purpose and the performance of a trust obligation to third parties.*

"It is true, but not material, that Rubber directed appellant to make its agreement with Products and did so to enable appellant to avoid the imposition of taxes on the tires and tubes described in the agreement. In giving such direction, Rubber acted in the interest and for the benefit of appellant. The agreement, a lawful and proper one, was not rendered unlawful or improper by the fact that Rubber directed it or, as the court found, 'dictated and arranged' it." 136 Fed. 2d at 348.

With respect to the contention of the Government that Tire, in addition to showing that it had not passed on the tax to its purchasing affiliate, Products, should also in order to comply with Section 621(d) of the Revenue Act of 1932 have established that Products had not passed on the tax to *its* ultimate purchasers, the Ninth Circuit Court stated:

"Finally, appellee contends that appellant failed to make the proof required by Sec. 621(d) of the Revenue Act of 1932, 26 U. S. C. A. Int. Rev. Acts, page 621, which provided: 'No overpayment of tax under this title (Sec. 601-630) shall be credited or refunded * * * unless the person who paid the tax establishes * * * that he has not included the tax in the price of the article with respect to which it was imposed * * *.' There is no merit in appellee's contention. The evidence clearly establishes that appellant did not include any excise tax in the price of the tires and tubes sold to Products by the agreement dated June 1, 1932." 136 Fed. 2d at 349.

From the above, it is clear that the *Samson-Rogan* decision is in conflict with that of the Circuit Court in the instant case insofar as it relates to Caldwell, both on the issue of the disregard of the corporate entities and the interpretation of Section 621(d).

B. The Decision of the Circuit Court of Appeals, Besides Being in Conflict, Insofar as it Relates to Transactions Between Standard and Caldwell, with Samson v. Rogan, Is Also in Conflict In Its Entirety with the Decisions on the Same Matter by the Second and Fifth Circuits Respectively in National Investors Corporation v. Hoey, 144 Fed. 2d 466 and Page v. Haverty, 129 Fed. 2d 512.

On pages 10 and 11 hereof, it was shown that the Circuit Court in the instant case held that, if a parent owns either all the voting stock or all the outstanding stock of a subsidiary, their separate corporate entities must, in a suit by the parent to recover excise taxes arising from transactions between them, be disregarded whenever recognition of the separate entities would result in a tax benefit to either, however long the subsidiary may have been owned by the parent or been in active competition with it before the transactions in question took place, and even though the subsidiary was not an instrumentality, agency or the alter ego of the parent but was completely autonomous and independent of it in its operations, and the transactions between them were bona fide, arm's-length transactions made for sound business reasons and not solely to effect tax savings. This holding is in conflict with the *National Investors Corporation v. Hoey,* Cir. 2, 144 F. 2d 466 and with *Page v. Haverty,* Cir. 5, 129 F. 2d 512.

In *National Investors Corporation v. Hoey,* the plaintiff-taxpayer, hereafter referred to as "National," for the sole purpose of unifying itself with three security holding subsidiaries, organized the National Investors *Fund,* here-

after referred to as "Fund," to which National transferred the securities of the subsidiaries in exchange for the Fund's stock. Because the unification plan was rejected by stockholders, National began liquidating the Fund by surrender of some of its stock in the Fund for some of the securities which the Fund had acquired from the subsidiaries. There was a very substantial decrease in value of the securities between the time that they had been originally transferred to the Fund and the time that they were re-acquired by National through surrender of some of Fund's stock to it. National endeavored to take this loss or decrease in value in computing its income and excess profits taxes. The Government contended that the loss could not be allowed to National because the sale or exchange between National and the Fund had been between a parent corporation and its sole shareholder. However, the Second Circuit Court held that to the extent that there had been a decrease in the value of the securities between the time of their transfer to the Fund *and a reasonable time* after the rejection of the plan, the loss in value could be taken by National because the Fund had during such period been used as a means of putting through the consolidation, *which was a business activity,* as was also the holding of the transferred securities while the plan was being considered by the shareholders. To the extent however, that the loss in the value of the securities may have been incurred after expiration of a reasonable time for rejecting the plan, the Court held that such loss could not be taken advantage of by National because, during that period, the Fund had no business purpose.

Before arriving at its conclusion, the Second Circuit analyzed the cases of *Burnet v. Commonwealth Improvement Company,* 287 U. S. 415; *Gregory v. Helvering,* 293 U. S. 465; *Higgins v. Smith,* 308 U. S. 473, and *Moline Properties, Inc. v. Commissioner,* 319 U. S. 436. The Circuit Court pointed out that it had misinterpreted the

Supreme Court's decision in *Burnet v. Commonwealth Improvement Company* in its decision in *Smith v. Higgins*, 2 Cir., 102 F. 2d 456, and had also misinterpreted the Supreme Court's decision in *Higgins v. Smith* in *U. S. v. Morris & Essex R. Co.*, 2 Cir., 135 F. 2d 711. It stated, however, that the Supreme Court had clarified its position in *Moline Properties, Inc. v. Commissioner* and that as a result of that decision, it, the Second Circuit, had come to the conclusion that before the Treasury could disregard the corporate form, it "must be unreal or a sham"; that it was not the "command of income and its benefits which marks the real owner of property," and that "to be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial or other activity besides avoiding taxes; in other words, (that) *the term 'corporation' will be interpreted to mean a corporation which does some 'business' in the ordinary meaning; and that escaping taxation is not 'business' in the ordinary meaning.*"

In *Page v. Haverty*, the Fifth Circuit Court held: "Existence of a corporate entity separate and distinct from stockholders who own it is a 'fiction' created and recognized by law as possessing substance *for tax* purposes." (Syllabus 2)

"A parent corporation's ownership of all stock of subsidiary does not warrant disregard of their separate legal entities unless the subsidiary is so controlled that it is in fact a mere instrumentality of the parent, or the separate corporate structure is used to promote fraud or injustice." (Syllabus 3)

"Where subsidiaries were not mere instrumentalities of parent corporation, and parent, when it had a large capital deficit and no accumulated earnings or profits, wrote down capital stock and distributed resulting surplus as dividend, fact that on that date some subsidiaries had

accumulated earnings and profits in excess of the amount distributed, did not necessitate treating such earnings and profits as belonging to the parent, and hence stockholders could obtain refund of income tax paid on such dividend on theory that it came from 'capital' rather than 'earnings and profits.' " (Syllabus 5)

The above discussion leaves no room for doubt that under the criteria laid down by the Second Circuit and Fifth Circuit Courts in *National Investors Corporation v. Hoey* and *Page v. Haverty,* these Courts would not, under the uncontradicted facts found by the District Court in the instant case, have felt justified in disregarding the separate corporate entities of Standard and its subsidiaries and hence would not have held that in order to comply with Section 621(d) of the Revenue Act of 1932, Standard was required to establish not only that *it* did not pass on the tax to its independent subsidiaries (which was all that the section required) but also that the subsidiaries did not pass on the tax to their ultimate purchasers. Accordingly, the Circuit Court's decision here involved is in clear conflict with the decisions of the Second and Fifth Circuit Courts in the above cases.

C. In Its Interpretation of Section 621(d) of the Revenue Act of 1932, the Circuit Court Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of the Supreme Court of the United States.

It is pointed out on page 8 hereof that in interpreting Section 621(d) of the Revenue Act of 1932 as it did, the Circuit Court necessarily disregarded the separate corporate entities of Standard and its two subsidiaries. The analysis made by Judge Learned Hand in *National Investors Corporation v. Hoey* of the recent United States Supreme Court decisions on the subject, which analysis was discussed on page 18 above, clearly shows that such disregard of the separate corporate entities by the Circuit

Court was not warranted by these Supreme Court decisions under the facts found by the District Court in the instant case. Accordingly, it may be justly stated that the Circuit Court's decision interpreting Section 621(d) was probably in conflict with applicable decisions of the Supreme Court of the United States.

D. The Circuit Court Decided Two Important Questions of Federal Law Which Have Not Been But Should Be Settled by the United States Supreme Court.

The Circuit Court decision involved two important questions of Federal law, which have not been but should be settled by the Supreme Court: (1) whether the Circuit Court properly interpreted Section 621(d) of the Revenue Act of 1932 in requiring the taxpayer to establish not only that it did not pass on the tax but also that its subsidiaries did not pass it on to their ultimate purchasers, and (2) whether a court is warranted in disregarding the separate corporate entities of a parent and its subsidiaries where the effect of so doing is to tax transactions which Congress had been urged to tax by the Treasury Department but had deliberately refused to tax. (See page 5 above.)

The first of these questions is important because, while Sec. 621(d) is no longer in force, Sec. 3443(d) I. R. C. Chap. 29A, which is identical with it (except that "Title" is changed to "Chapter") is still in force. Coupling this fact with the fact that numerous *very high* Federal excise taxes on manufacturers and dealers have been in force during the last few years and are still in force, e.g., manufacturers' taxes on tires and tubes, automobiles, gasoline, refrigerators, toilet preparations, and that these will undoubtedly result in numerous suits for recovery of overpayments of tax, it is of great importance that the Supreme Court guide the Commissioner and the courts as to precisely what this section requires as a condition to a recovery of an overpayment of excise taxes, so that this question may not have

to be determined on the basis of general principles enunciated by the Supreme Court in other cases.

The second question is important because it should be made clear by the Supreme Court whether, in the light of the doctrine of The Separation Of Powers, taxing statutes should not be interpreted primarily to effectuate the intent of Congress rather than to enrich the Government.

In the instant case, the Circuit Court denied recovery to Standard by resorting to an exception to the general rule that the separate entities of independent corporations in bona fide transactions are to be recognized. It is important that the Supreme Court decide whether resort to such an exception is permissible where the effect of so doing is to impose a tax on transactions which Congress *deliberately* refused to tax—especially where these transactions involved neither fraud, trickery, nor sinister motive, but were made for sound business reasons and were identical in character with transactions in great numbers made by others which the Government itself admitted were not subject to tax.

Wherefore, petitioner prays that this Court issue a Writ of Certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case entered February 3, 1947.

Respectfully submitted,

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Midland Building,
Cleveland 15, Ohio,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION and REQUEST FOR ORAL ARGUMENT.

The arguments in support of the Petition were, for the sake of clarity and brevity, embodied in the Petition itself. Hence no additional Brief in Support of the Petition is filed.

Counsel for Petitioner, though fully aware that oral argument on Petitions for Writs of Certiorari is not a matter of right, respectfully request the opportunity for such oral argument, if in the Court's judgment such argument might be helpful.

Respectfully,

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Counsel for Petitioner.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169.

Sec. 601. Excise Taxes on Certain Articles.

* * * * *

(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

(1) Lubricating oils, 4 cents a gallon; but the tax on the articles described in this paragraph shall not apply with respect to the importation of such articles.

* * * * *

Sec. 617. Tax on Gasoline.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

* * * * *

Sec. 621. Credits and Refunds.

* * * * *

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under sub-section (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Sec. 629. Effective Date.

This title shall take effect on the fifteenth day after the date of the enactment of this Act, except that section 628, relating to rules and regulations, and this section, shall take effect on the date of the enactment of this Act. * * *

National Industrial Recovery Act, c. 90, 48 Stat. 195.

Sec. 211. (a) Effective as of the day following the date of the enactment of this Act, section 617(a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents."

* * * * *

(7 U. S. C. 1940 ed., Sec. 607.)

Treasury Regulations 44 (1934 edition).

Art. 84. Credits and refunds.—

* * * * *

In all cases where a person overpays tax, no credit or refund shall be allowed (except as provided in the preceding paragraph), whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the commodity with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of tax to the ultimate purchaser of the commodity or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. For the purpose of the tax the "ultimate purchaser" is a person who purchases an article (1) for consumption, or (2) for use in the manufacture of other articles and not for resale in the form in which purchased. The statement sup-

porting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

Sec. 3443(d) I. R. C. Chap. 29A, which is now in force, is identical with Sec. 621(d) of the Revenue Act of 1932 above quoted, except that the word "title" in the first line of Sec. 621(d) has been changed to "chapter."

In the Supreme Court of the United States

No. 1299.

OCTOBER TERM, 1946.

THE STANDARD OIL COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Circuit Court of Appeals
For the Sixth Circuit.

REPLY BRIEF OF PETITIONER, THE STANDARD OIL COMPANY.

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In the Supreme Court of the United States

No. 1299.

OCTOBER TERM, 1946.

THE STANDARD OIL COMPANY,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER, THE STANDARD OIL COMPANY.

PRELIMINARY STATEMENT.

Standard agrees with the Attorney General that the immediate question presented is whether the refund claim met the requirements of Section 621(d) of the Revenue Act of 1932, and Article 84 of Treasury Regulation 44. However, Standard insists that the decision of the Circuit Court of Appeals that the claim did not meet these requirements was erroneous, and was in conflict with *Samson Tire & Rubber Corporation v. Rogan, Collector,* 136 Fed. 2d 345, C. C. A. 9 (Writ of Certiorari denied, 320 U. S. 770) in so far as it related to resales of goods sold by Standard to Caldwell, a controlled but not wholly owned subsidiary; and with the cases of *National Investors Corporation v. Hoey,* 144 Fed. 2d 466, C. C. A. 2, and *Page v. Haverty,* 129 Fed. 2d 512, C. C. A. 5, with respect to resales of *all* the

goods sold by Standard to its two subsidiaries. The Circuit Court of Appeals' decision, moreover, gives rise to important Federal questions which have not been but should be settled by the United States Supreme Court.

The Decision of the Circuit Court of Appeals that Standard's Refund Claim Did Not Comply with Section 621(d) and the Applicable Regulations, Was Erroneous.

Even the Attorney General suggests only half-heartedly that Standard did not establish in its refund claim that it did not collect the tax from its subsidiaries. That it did establish this fact appears from the fact that the refund claim expressly alleges (R. 18-22) that Standard alone paid the tax; that its sales to its two subsidiaries were bona fide, valid sales, completed *before* the applicable tax laws went into effect; that the resales of the products sold to the subsidiaries were not made by Standard, but by the subsidiaries, and were all made *after* the effective date of the tax law; that the subsidiaries were independent and autonomous, and were neither divisions, agencies, instrumentalities or the alter ego of Standard; that the Commissioner never asserted a tax with respect to Standard's sales to its subsidiaries but that he assessed a tax only with respect to the *resales* made by the subsidiaries to their ultimate purchasers after such effective date; that the revenue laws imposed a tax only with respect to sales made after its effective date by manufacturers and producers; that Standard was a manufacturer and producer, but that the subsidiaries whose resales were alone assessed were only dealers and not manufacturers or producers, and that they were not subject to tax upon any sales made by them; further, that Standard had not collected any part of the tax from either of its subsidiaries.

In other words, Standard expressly alleged in its refund claim that its sales to its subsidiaries were made before the tax became effective, and that it did not collect the

tax from them;* that the resales on which the tax was alone assessed were made by its independent subsidiaries and not by it, and that it had nothing to do with these resales.

However, the Circuit Court of Appeals' decision holds that in order to comply with Section 621(d) Standard, in addition to establishing in its refund claim that *it* did not pass on the tax to its subsidiaries, must also establish therein that its subsidiaries did not pass on the tax to *their* ultimate purchasers. As Section 621(d) merely requires "the person who paid the tax" to establish that "*he* has not included the tax in the price of the article with respect to which it was imposed," or collected it from the "vendee," it necessarily and admittedly follows that as Standard alone paid the tax, Section 621(d) does not make the additional requirement that it establish in its refund claim that its subsidiaries did not pass on the tax to their customers. The Attorney General, however, contends that the fact that the subsidiaries were respectively jointly assessed with Standard and that they joined in the refund claim with Standard imposes this additional requirement, in that thereby the subsidiaries became "taxpayers" and "refund claimants" within the meaning of Section 621(d), and hence were under the obligations imposed on "taxpayers" by that section. That this contention is without substance or validity appears from the following:

(a) The joining of the subsidiaries in the assessment with Standard was an absolute nullity. The applicable revenue laws imposed the tax only on producers and manufacturers of gasoline and oil, and not

---

* The Government admitted in open court that Standard did not collect any part of the tax from the subsidiaries (R. 187-188), and it was stipulated that Standard's prices to the subsidiaries on these sales were as low as those which had prevailed for some time before the applicable tax laws were enacted. (Stipulations 17 and 35, R. 43 and 51.)

upon dealers. Nevertheless, the Commissioner assessed the tax against the subsidiaries although he knew and admitted at the time that they were not then and never had been manufacturers or producers, but only dealers—a fact which was stipulated and was also known to the Circuit Court of Appeals.

(b) The joining of the subsidiaries in the assessment certainly did not make them taxpayers. Whether a person assessed is a taxpayer is a question of fact. As there is nothing in the record indicating that the subsidiaries paid any part of the tax, whereas the refund claim itself (Form 843) shows under the heading "Name of Taxpayer—The Standard Oil Company (Ohio)," (R. 15) and as the sworn statement of the subsidiaries appearing immediately after Standard's refund claim, certifies specifically that the entire amount of tax was paid by Standard and no portion thereof by either of the subsidiaries, it is clear that the subsidiaries were not taxpayers.

(c) Nor is there any warrant for the claim that Standard paid the tax on behalf of the subsidiaries. Standard knew that the assessments against the subsidiaries—seeing that they were not producers or manufacturers—was a nullity, and the assumption that the payments were made in their behalf on an invalid assessment is wholly unwarranted, especially when Standard itself was one of the parties assessed.

(d) Nor does the fact that the subsidiaries joined in the refund claim with Standard and consented "to the granting of such refund—and the payment thereof—to The Standard Oil Company," warrant the conclusion that they were either taxpayers or refund claimants. They joined in the refund claim only as a formal matter because they had been jointly though invalidly assessed and to avoid technical questions be-

ing raised against Standard by reason of their having been jointly assessed. They made no claim for refund for themselves. The fact is they did not even sign or swear to the refund claim itself, as would be required if they had been refund claimants on their own account. Undoubtedly had they attempted to collect any money on Standard's refund claim themselves the Government would have been the first to deny that they had filed a claim for refund on their own behalf.

The above discussion demonstrates that the fact that the subsidiaries were jointly assessed with Standard and joined in the refund claim imposed no obligation on Standard which would not have been imposed upon it had the subsidiaries not been jointly assessed or had they not joined in the refund claim.

Therefore, Standard asserts that it fully complied with the requirements of Section 621(d) and the applicable regulations.

The Facts in the Instant Case are Practically Identical with Those in the Samson Tire & Rubber Corporation v. Rogan.

The above discussion also demonstrates that the joint assessment of the subsidiaries with Standard and their joining in its refund claim added no material element to the instant case (in so far as it related to transactions with Caldwell, a *partially* owned but controlled subsidiary), which was not present in *Samson v. Rogan*. While it is true that in the *Samson v. Rogan* case the taxpaying manufacturer did not sell the tires involved in that case to its *immediate* subsidiary, but to a subsidiary of a top corporation which controlled both the selling and buying corporation, this does not involve a distinction in principle between the instant case and *Samson v. Rogan*, especially as the top corporation "directed," "dictated and arranged"

the sale involved in the *Samson v. Rogan* case. Accordingly, the *Samson v. Rogan* case is practically on all-fours with the instant case on the pertinent facts.

The Attorney General contends that the *Samson v. Rogan* case did not involve a direct decision as to what allegations had to be embodied in the refund claim in order to satisfy the requirements of Section 621(d). That is true. However, the case did hold that by establishing at the trial that the taxpayer had not passed on the tax to his vendees, even though he did not also show that his vendees did not pass on the tax to their ultimate purchasers, the taxpayer had fulfilled all the "proof" requirements of Section 621(d). As the facts which must be proved under the statute at the trial are no different than the facts which must be alleged in the refund claim, it follows that *Samson v. Rogan* in effect held that Section 621(d) did not require the refund claim to embody allegations that the taxpayer's vendees had not passed on the tax to their ultimate purchasers. *Samson v. Rogan* is, therefore, in direct conflict with the decision in the instant case with respect to the allegations which Section 621(d) requires to be embodied in the refund claim.

The Circuit Court of Appeals' Decision in its Entirety is in Conflict with National Investors Corporation v. Hoey, 144 Fed. 2d 466, and Page v. Haverty, 129 Fed. 2d 512.

Standard in its petition herein (pp. 8 to 10) took the position, the correctness of which is confirmed by the foregoing discussion, that as the joint assessment of the non-producer subsidiaries was a nullity and could therefore in no degree form a basis for the Circuit Court of Appeals' decision, that Court, by requiring Standard to allege in its refund claim that its subsidiaries had not passed on the tax to *their* ultimate purchasers, necessarily and inevitably treated these purchasers as Standard's vendees for purposes of Section 621(d), i.e., treated Standard and its sub-

sidiaries as one, and that the *necessary effect* of the Court's decision (whether it intended this or not), was to hold that *whenever* a parent owned all the voting stock of a subsidiary and a tax benefit might result to either from transactions between them, their separate corporate entities must be disregarded. This conclusion is inevitable when it is considered that in the instant case the subsidiaries were completely independent and autonomous, that the transactions between them and Standard had a sound business purpose, were required to meet competition and were not entered into solely for tax saving reasons.

The decision is therefore in conflict as to transactions involving Caldwell, with *Samson v. Rogan,* and as to transactions involving both Caldwell and Fleet-Wing with *National Investors Corporation v. Hoey,* and *Page v. Haverty,* these latter two cases having held that the separate corporate entities of parent and subsidiaries could not be disregarded where the subsidiaries were engaged in business and not merely in escaping taxation.

The instant decision, moreover, presents the important Federal questions set forth on pages 13 and 14 of Standard's petition.

If the Circuit Court of Appeals' Decision were Based on the Joint Assessment of the Subsidiaries and Not on the Assumed Identity of the Subsidiaries and Standard, it would Enable the Commissioner Arbitrarily to Deprive Courts of Jurisdiction to Consider Many Refund Claims on Their Merits.

If the Circuit Court of Appeals' decision is not based on the assumed identity of Standard and its subsidiaries, but on the fact that the subsidiaries were jointly assessed with Standard, then its effect, if the decision were allowed to stand, would be to enable the Commissioner, *by the simple expedient of assessing the subsidiaries jointly with their parent,* effectively and forever to block the parent

from recovering a tax paid by it on goods sold by it to its subsidiary and resold by the latter, whenever it cannot allege *in its refund claim* that its subsidiaries did not pass on the tax to their ultimate purchasers. This would be true no matter how independent and autonomous the subsidiaries might be, how bona fide and at arm's length, and how sound from a business standpoint apart from any tax saving purpose, all transactions between the parent and its subsidiaries may have been. Indeed, the Commissioner could if the Circuit Court of Appeals' decision were allowed to stand, by the device of the joint assessment, deprive the courts of jurisdiction to pass on the merits of such refund claims even where, as in the instant case, the Commissioner knew, when he joined the subsidiaries in the assessments, that the assessments were not sanctioned by statute and were wholly invalid, they having been made against dealers and not producers.

Standard does not believe this Court will want to place so far-reaching and arbitrary a power in the Commissioner's hands where this is not required by statute.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

Dated May 29, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1299

THE STANDARD OIL COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 276–298) is reported at 63 F. Supp. 48, and the opinion of the Circuit Court of Appeals (R. 318–325) is reported at 158 F. 2d 126.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 5, 1946 (R. 317). An application for rehearing (R. 327–342) was denied on February 3, 1947 (R. 343). The petition for a writ of certiorari was filed on April 28, 1947. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the claim for refund of excise taxes and interest filed by the petitioner, in which two of its subsidiaries joined, met the requirements of Section 621 (d) of the Revenue Act of 1932 and Article 84 of Treasury Regulations 44 (1934 ed.), and was thus sufficient to support a suit for refund under Section 3226 of the Revised Statutes.

STATUTE AND REGULATIONS INVOLVED

The applicable statutes and regulations are printed in the Appendix, *infra*, pp. 16–18.

STATEMENT

The facts found by the District Court (R. 298–307) and as shown by the stipulation (R. 36–62) and the exhibits attached to the complaint (R. 13–27), so far as material here, may be summarized as follows:

The Standard Oil Company (hereinafter referred to as "Standard") is an Ohio corporation engaged in the business of refining crude petroleum, manufacturing lubricating oils and other petroleum products, and distributing the oils and products at wholesale and retail (R. 298–299). It was a manufacturer or producer of gasoline and lubricating oils within the meaning of Section 601 (c) (1) and Section 617 (a) of the

Revenue Act of 1932 as originally enacted and as amended by Section 211 (a) of the National Industrial Recovery Act, which imposed excise taxes upon the sale of these products by manufacturers or producers (R. 299–300).[1]

Caldwell & Taylor Corporation (hereinafter referred to as "Caldwell") was an Ohio corporation organized in 1929 by Standard and one A. B. Caldwell to acquire the assets of four predecessor companies and to engage in the distribution of gasoline, lubricating oils, and other petroleum products by tank wagon and retail service stations. It was not a manufacturer or producer of gasoline and oil; it purchased all of the products sold by it. In June, 1932, Standard owned all of Caldwell's voting common stock and all ($733,000 par value) of its Series B non-voting preferred stock. A. B. Caldwell owned all ($147,000 face amount) of its Series A non-voting preferred shares. (R. 300.) During 1932, Caldwell purchased most of its gasoline from Standard and most of its lubricating oils from other suppliers. It resold these products under its own trade names through its own facilities to

[1] Effective June 21, 1932, the tax on the sale of oil was four cents a gallon and on the sale of gasoline was one cent a gallon. Sections 601 (c) (1), 617 (a) and 629 of the Revenue Act of 1932 (Appendix, *infra*, pp. 16, 17). Effective June 17, 1933, the tax on the sale of gasoline was increased to 1½ cents a gallon. Section 211 (a) of the National Industrial Recovery Act. Appendix, *infra*, p. 17.

its own customers in competition with Standard. (R. 301.)

On June 17, 1932, Caldwell leased certain gasoline storage tanks from Standard and from another of its subsidiary companies and, on June 20, 1932, it purchased from Standard 2,671,735 gallons of gasoline then contained in the previously leased storage tanks. Caldwell paid for the gasoline by checks drawn on its own account within a relatively short period thereafter. This quantity of gasoline represented forty-five to fifty days' normal requirements of Caldwell. Caldwell sold the gasoline on and after June 21, 1932, in the regular course of its business under its own trade names to its own customers. (R. 301–302, 304.) Caldwell was liquidated as of October 31, 1932 (R. 300).

Fleet-Wing Corporation (hereinafter referred to as "Fleet-Wing"), in June 1932 and June 1933, was a wholly owned subsidiary of Standard, engaged in the sale and distribution of gasoline and motor oils to jobbers. It had been organized in 1928 to acquire a predecessor's business and assets. It was not a manfacturer or producer of gasoline and lubricating oils, and in 1932 and 1933, it purchased most of its gasoline from Standard and most of its oils from other suppliers. It resold them under its own trade names to its own jobber customers. (R. 301.)

On June 20, 1932, Fleet-Wing leased gasoline

and oil storage tanks from Standard and from one of its subsidiary companies and, on the same day, purchased from Standard 5,932,687 gallons of gasoline and 122,036 gallons of lubricating oil contained in the leased tanks. It paid for these purchases by checks on its own account during September, October, and November 1932. (R. 302.) The gasoline so purchased represented a forty-five days' normal requirement (R. 305).

On June 12, 1933, Fleet-Wing leased gasoline storage tanks from Standard and from one of its subsidiary companies and on the same day purchased 3,933,779 gallons of gasoline contained in the leased tanks. The purchase price was paid on October 31, 1933, by the transfer of Fleet-Wing's assets to Standard in liquidation. (R. 302.) The gasoline so purchased was less than a thirty days' normal requirement (R. 305).

After these sales to Caldwell and Fleet-Wing, Standard had ample inventories to supply its own customers in the ordinary course of business. (R. 303.)

At the time of the purchases by Caldwell and Fleet-Wing on June 20, 1932, their non-producing competitors were purchasing large quantities of gasoline in anticipation of an increase in cost following the effective date (June 21, 1932) of the new excise tax on sales of gasoline and lubricating oils by producers. Caldwell purchased the gasoline from Standard on June 20, 1932, to ob-

tain an extra supply of gasoline at the lower cost then prevailing to enable it to meet competitive conditions which its president anticipated would exist following the incidence of the tax. (R. 303–304.) Fleet-Wing purchased oil and gasoline from the taxpayer on June 20, 1932, and on June 12, 1933,[2] for the same reasons (R. 305).

After investigation and audit, the Commissioner determined that Caldwell and Fleet-Wing were mere instrumentalities of their parent corporation, Standard, in selling after the excise tax became effective the gasoline and lubricating oil transferred to them just prior to the effective dates of the tax,[3] and hence that the sales were subject to tax (See R. 24–26). Accordingly, he assessed excise taxes and interest thereon in respect of these sales jointly against Standard and Caldwell and jointly against Standard and Fleet-Wing (R. 13, 27, 59–60). On various dates in 1937, Standard paid the taxes so assessed to the Collector of Internal Revenue for the Eighteenth District of Ohio (R. 61, 299). On May 20, 1939, it filed with the Collector a claim for

[2] As previously noted, the tax on gasoline increased one-half cent a gallon effective on June 17, 1933. Section 211 (a), National Industrial Recovery Act.

[3] His determination was based in part on evidence that the storage tanks containing the gasoline and oil were leased by the subsidiaries for a rental charge of $1 per year per tank, and that the recited consideration for each one of the "sales" by Standard to Caldwell and Fleet-Wing was $10 for the entire gallonage transferred (R. 25).

refund of excise taxes and interest paid in the amount of $158,120.51, plus interest (R. 15–22, 23, 61–62). Caldwell and Fleet-Wing joined in the claim and consented to the payment of any amount refunded to Standard (R. 22).

By letter dated February 17, 1940, the Commissioner rejected the claim in full (R. 24–26, 62). The grounds for rejection were that the claim could not be allowed on the merits in view of the information developed in the previous investigation in 1936 which resulted in assessment of the taxes (R. 24–26) and also that the Commissioner was prohibited by Section 621 (d) of the Revenue Act of 1932 from allowing any refund because the taxpayer had failed to comply with its terms (R. 26).

Suit was then instituted by Standard in the District Court to recover the amount of $158,120.51, plus interest (R. 299). Before trial, the United States filed a motion to dismiss the suit on the ground that the court had no jurisdiction because Standard's claim for refund was insufficient for failure to comply with Section 621 (d) of the Revenue Act of 1932 (R. 31, 277–278). The United States also asserted as a defense in its answer the insufficiency of the claim as a basis for the action (R. 35). The District Court overruled the motion to dismiss, holding that the allegations of the claim complied fully with Section 621 (d) and with Article 84 of Treasury Regulations 44,

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and that in any case the United States had waived any defect in the claim, if one existed (R. 278-282).

On the merits, the District Court concluded that the sales by Standard to Caldwell on June 20, 1932, and to Fleet-Wing on June 20, 1932, and June 12, 1933, were at reasonable prices and were valid and *bona fide* sales, fully consummated on those dates (R. 305-306); that at the time of the sales neither Caldwell nor Fleet-Wing was being operated as a branch, agency, or instrumentality of Standard (R. 304, 305); that the subsequent resales by Caldwell and Fleet-Wing of the products so purchased were not in fact or in law sales made by Standard (R. 306); and that Standard was not liable for excise tax upon the sales (R. 306).

The Circuit Court of Appeals reversed, Judge Miller dissenting, for the reason that the claim for refund did not comply with the requirements of Section 621 (d) of the Revenue Act of 1932 and Article 84 of Treasury Regulations 44, and that it was not sufficient to furnish a basis for suit in the District Court (R. 318-325).

ARGUMENT

The decision of the Circuit Court of Appeals is correct and is not in conflict with any decision. It is required by Section 3226 of the Revised Statutes (Appendix, *infra*, pp. 17-18) and is in accord with well-established principles that a court has no jurisdiction to entertain a suit for refund of a

tax unless there has been filed a claim for refund which complies literally with all the requirements, including those formal in nature only, set out in the statute authorizing refund and the administrative regulation issued thereunder. *Angelus Milling Co.* v. *Commissioner,* 325 U. S. 293; *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269; *Tucker* v. *Alexander,* 275 U. S. 228; *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141. See also *United States* v. *Memphis Cotton Oil Co.,* 288 U. S. 62; *United States* v. *Henry Prentiss & Co.,* 288 U. S. 73; *United States* v. *Factors & Finance Co.,* 288 U. S. 89.

Section 621 (d) of the Revenue Act of 1932 expressly conditions the right to refund of the excise taxes involved here, even pursuant to court decision, upon the establishment in the way prescribed by the regulations of certain specific facts. Article 84 of Treasury Regulations 44 (1934 ed.) requires, *inter alia,* that the statutory facts be established by the filing with the refund claim of a sworn statement by the taxpayer. The sworn statement filed by Standard with the claim for refund in this case, in which Caldwell and Fleet-Wing joined (R. 18–22), fails to comply with these specifications, as the Circuit Court of Appeals correctly held (R. 322). No facts are stated which even tend to show that Caldwell and Fleet-Wing, which had been jointly assessed for the tax and which joined in the claim, did not include the

tax in the prices of gasoline and oil collected by them and did not collect the tax from the vendees.[4] Nor is there any precise statement that Standard itself did not do so. The most that can be said is that it might be inferred from the statement that Standard did not collect the tax from Caldwell and Fleet-Wing, but even if this inference were made, it entirely fails to establish that Standard was not unjustly enriched by collecting the tax through its subsidiaries from others. Furthermore, the statement does not show that the tax had been repaid by any one of the claimants to the ultimate purchasers, nor were there attached the written consents of such purchasers to allowance of the refund. The written consent of Caldwell and Fleet-Wing to payment of any refund to Standard (R. 22) did not comply with the regulation since the subsidiaries merely resold the gasoline and oil in the form in which it was transferred to them and hence they were not ultimate purchasers as defined in the regulation. Cf. *Feitler* v. *Harrison,* 126 F. 2d 449 (C. C. A. 7th). These omissions are fatal to the right to refund. Section 3226 of the Revised Statutes; cf. *Angelus Milling Co.* v. *Com-*

[4] The Government offered evidence as to the resale prices of Fleet-Wing and Caldwell of the gasoline and oil here in question, but the District Court excluded it as immaterial (R. 309). The Government assigned error in the Circuit Court of Appeals with respect to exclusion of this evidence but it was unnecessary for the court to decide this point, although it referred to the matter (R. 322).

missioner, 325 U. S. 293; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386; *Vica Co.* v. *Commissioner*, 159 F. 2d 148 (C. C. A. 9th), pending on petition for writ of certiorari, No. 1260, this Term. *Samara* v. *United States*, 129 F. 2d 594 (C. C. A. 2d), certiorari denied, 317 U. S. 686, relied on by the District Court (R. 282), is not contrary for the reasons pointed out by the Circuit Court of Appeals (R. 324).

As the court below held, no facts were shown to prove that the Commissioner waived the defects in the claim (R. 323–324). On the contrary, the Commissioner expressly rejected the claim on the ground that it was insufficient to meet the statutory requirements (R. 26). While he also rejected it on the merits, he did not do so as a result of an independent investigation of the claim on the merits, but on the basis of evidence already in his files from an investigation antedating the claim which had resulted in assessment of the tax in the first instance (R. 24–26). In these circumstances, there was clearly no waiver. Cf. *Angelus Milling Co.* v. *Commissioner*, *supra*. Indeed, Standard does not contend in its petition in this Court that the facts here show a waiver.[5]

Standard does contend (Pet. 8–9) that it alone was the taxpayer and that as to it the claim con-

[5] The letter of rejection put Standard on notice that an essential element of its case was lacking, i. e., the filing of a good claim, even though the letter did not explicitly refer to the regulations but only to Section 621 (d). On the date of

tains all essential statements. As already shown, the allegations in the claim with respect to Standard alone are insufficient. Furthermore, the contention ignores the facts that the subsidiaries were jointly assessed for the tax with Standard and that they made themselves parties to the claim for refund. Standard's election to pay the tax discharged the assessments against its subsidiaries as well as itself, and even if the subsidiaries had not joined in the claim, the view of the court below seems correct that by virtue of the payment of the assessed taxes on their behalf they were taxpayers in the sense that they must comply with the conditions precedent for refund. Any other rule would sanction evasion of the real purpose of the statutory requirements. In any case, there would seem to be no doubt that a party to a claim for refund is not excused from complying precisely with the conditions precedent to the right to refund through attributing a literal meaning to the term "taxpayer."[6] Cf. *L. T. Piver, Inc.* v. *Hoey,* 101 F. 2d 68 (C. C. A. 2d).

The previous discussion shows that there is no basis for Standard's belief (Pet. 9–12) that the Circuit Court of Appeals could only have

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rejection (February 17, 1940) Standard was not barred from filing a new claim. Section 3313 of the Internal Revenue Code allows four years for filing claims for refund of excise taxes after the taxes are paid. The taxes here were paid in May, June, and September of 1937 (R. 299).

[6] Section 621 (d) uses the term "person who paid the tax," but the regulation refers to the "taxpayer."

reached the result which it did by disregarding the separate entities of Standard and the two subsidiaries. Indeed, the court expressly made the assumption (see R. 322) that the transactions between Standard and its subsidiaries were *bona fide* transactions between independent corporations.

Samson Tire & Rubber Corp. v. *Rogan*, 136 F. 2d 345 (C. C. A. 9th), certiorari denied, 320 U. S. 770, is not in conflict with the decision below, as Standard asserts (Pet. 14–18). In the *Samson* case, the taxes were not assessed against the purchasing corporation nor did it join in the claim for refund. There was there no issue whatever as to the jurisdictional sufficiency of the claim for refund and patently no decision as to sufficiency of a claim in the circumstances of this case.[7] Furthermore, since the Circuit Court of Appeals here did not disregard the corporate identity of the two subsidiaries, it is unnecessary to consider to what extent the *Samson* case (as well as *National Investors Corp.* v. *Hoey*, 144 F. 2d 466 (C. C. A. 2d), and *Page* v. *Haverty*, 129 F. 2d 512 (C. C. A. 5th), also relied on by Standard (Pet. 18–21) on this point)

[7] The *Samson* case is different in another respect from the instant one. The sale immediately prior to the tax was not by a parent corporation to its controlled subsidiary. Both the seller and the purchaser were subsidiaries of other companies which were members of the same interlocking corporate family.

might be in conflict if the court below had made such a holding. It is our position, however, that the factual differences in the instant case would preclude a clear conflict.[8]

Similarly, since the Circuit Court of Appeals predicated its holding solely on the insufficiency

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[8] Indeed, it seems that the Circuit Court of Appeals might justifiably have reversed the District Court on the merits in this case. Transactions between a corporation and its sole or controlling stockholder need not be recognized for tax purposes where the only motive is tax avoidance, even though for other purposes the transaction may be valid and fully effective. *Higgins* v. *Smith*, 308 U. S. 473; *Gregory* v. *Helvering*, 293 U. S. 465; cf. *Moline Properties* v. *Commissioner*, 319 U. S. 436; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331. The purpose for the intercorporate transactions here, as found by the District Court (R. 303–304, 305), is in essence nothing more than a tax-avoidance motive phrased in terms of protecting the corporate profits to the extent of the tax. Certainly there was no business purpose independent of the tax-avoidance motive. In similar situations, the great weight of authority supports the view that the parent-producer or manufacturer is for tax purposes the seller of the taxable commodity, effecting the sale by using its controlled subsidiary as a conduit through which to pass title. See *Continental Oil Co.* v. *Jones*, 113 F. 2d 557 (C. C. A. 10th), certiorari denied, 311 U. S. 687; *Mehrlust* v. *Higgins*, 112 F. 2d 717 (C. C. A. 2d), certiorari denied, 311 U. S. 677; *E. Albrecht & Son* v. *Landy*, 114 F. 2d 202 (C. C. A. 8th); *Campana Corp.* v. *Harrison*, 114 F. 2d 400 (C. C. A. 7th); *Black, Starr & Frost-Gorham* v. *United States*, 39 F. Supp. 109 (C. Cls.). *Samson Tire & Rubber Corp.* v. *Rogan*, *supra*, reached a different conclusion, but, as previously noted, there was no purported sale there by a parent corporation to its controlled subsidiary. In *Moline Properties* v. *Commissioner*, 319 U. S. 436, 439, this Court explained the decision in *Continental Oil Co.* v. *Jones*, *supra*, as necessary to strike down a fraud on the tax statute.

of the claim for refund in the particular circumstances of this case, the judgment below does not present the questions of whether Section 621 (d) requires the subsidiaries of a parent-taxpayer generally to establish that they did not shift the tax burden to their ultimate purchasers or of whether the judgment below conflicts, in its result, with the intent of Congress (See Pet. 22–23). It may be pointed out, however, that while Congress did not enact a specific provision making all gasoline transferred to affiliated sales companies just prior to the excise tax subject thereto (see R. 296), this does not negative the intention that the courts shall give effect to substance and hold that products transferred to an affiliate are liable to the tax when sold, if the previous transfer had no business purpose unconnected with tax avoidance.[9] See cases cited in footnote 8, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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May 1947.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

Sec. 601. Excise taxes on certain articles.

*　　*　　*　　*　　*

(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

(1) Lubricating oils, 4 cents a gallon; but the tax on the articles described in this paragraph shall not apply with respect to the importation of such articles.

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Sec. 617. Tax on gasoline.

(a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, except that under regulations prescribed by the Commissioner with the approval of the Secretary the tax shall not apply in the case of sales to a producer of gasoline.

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Sec. 621. Credits and refunds.

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(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from

the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

SEC. 629. EFFECTIVE DATE.

This title shall take effect on the fifteenth day after the date of the enactment of this Act, except that section 628, relating to rules and regulations, and this section, shall take effect on the date of the enactment of this Act. * * *

National Industrial Recovery Act, c. 90, 48 Stat. 195:

Section 211. (a) Effective as of the day following the date of the enactment of this Act, section 617 (a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1½ cents."

* * * * *

Revised Statutes:

SEC. 3226 [as amended by Section 1103, Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 807, Revenue Act of 1936, c. 690, 49 Stat. 1648]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of

the Treasury established in pursuance thereof; * * *

Treasury Regulations 44 (1934 edition):

ART. 84. *Credits and refunds.*—

* * * * *

In all cases where a person overpays tax, no credit or refund shall be allowed (except as provided in the preceding paragraph), whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the commodity with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he was either repaid the amount of tax to the ultimate purchaser of the commodity or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. For the purpose of the tax the "ultimate purchaser" is a person who purchases an article (1) for consumption, or (2) for use in the manufacture of other articles and not for resale in the form in which purchased. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

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Article 52 of Treasury Regulations 44 (1932 ed.) is substantially the same.

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